

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs September 28, 2004

STATE OF TENNESSEE v. WILEY YAVEL SMITH

**Appeal from the Criminal Court for Hamilton County
No. 244470 Rebecca Stern, Judge**

No. E2004-00176-CCA-R3-CD - Filed October 8, 2004

The defendant, Wiley Yavel Smith, pled guilty in the Hamilton County Criminal Court to attempted especially aggravated robbery, a Class B felony, and the trial court sentenced him as a Range I, standard offender to nine years in confinement. The defendant appeals, claiming that his sentence is excessive and that he should receive an alternative sentence. We hold that the trial court improperly enhanced the defendant's sentence and modify the sentence to eight years. We conclude that alternative sentencing is not appropriate in this case.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed as Modified

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Ardena J. Garth, District Public Defender, and Donna Robinson Miller, Assistant Public Defender, for the appellant, Wiley Yavel Smith.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William H. Cox, III, District Attorney General; and Boyd M. Patterson, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's shooting the victim as they struggled over a gun on November 13, 2002. At the guilty plea hearing, the state gave the following factual account of the crime: The defendant went to the victim's apartment in order to collect money that the victim owed him. When the victim refused to pay the defendant, the defendant left the apartment but returned with a pistol. The defendant shot through a wall of the apartment, and the defendant and the victim began struggling over the gun. During the scuffle, the pistol fired, and the victim was shot in the neck.

At the sentencing hearing, the victim testified that on November 13, 2002, the defendant came to his apartment and asked for money that the victim had borrowed. The victim told the defendant that he did not have the money, and the defendant got mad and left. Later, the defendant returned to the apartment, pulled out a gun, and told the victim to give him all of the money that the victim had. When the victim told the defendant that he did not have any money, the defendant pointed the gun at a wall, fired a shot and said, "I'm not playing", and tried to hit the victim with the gun. The victim and the defendant began fighting, and the gun fired. The victim testified that his girlfriend and a friend were in the apartment at the time of the shooting and that another apartment was adjacent to the wall that the defendant fired into. A bullet struck the victim in the neck, and the victim's friend telephoned 9-1-1. The bullet severed the victim's carotid artery, and doctors had to take a vein from the victim's thigh and put it in his neck in order to repair the damage. He said that the doctors did not remove the bullet from his neck because it was too close to his spine. He said he spent five days in the hospital, received physical therapy for six months, and had nerve damage in his left arm. He said that he could no longer "play ball," that the bullet had affected his voice, and that he owed about \$45,000 in medical bills.

Patricia Allen, the victim's mother, testified that the doctors told her the victim could have died during surgery and that she was thankful he was alive. She said that she had a hard time understanding the victim's voice and that she constantly had to ask him to repeat himself.

The defendant testified that he did not mean to shoot the victim. He said that he had moved to Chattanooga four or five years before the sentencing hearing and that he had a car wreck soon after the move. He said that a dump truck pulled out in front of him and that he suffered multiple injuries as a result of the wreck, including a broken hip, a pinched nerve in his neck, and head trauma. He said that he still suffered from his injuries and that he received about \$70,000 from a legal settlement with the other driver. After the defendant received the settlement money, he loaned some of it to friends and spent the rest. He said that although he did not have any money left, he could get a job as a cook or working for his stepfather and would be willing to pay restitution to the victim. He said he currently was taking Depakote for bipolar disorder and schizophrenia, Trileptal for depression, and muscle relaxers.

The defendant testified that while he was on bond in this case, he and his wife got into an argument and he blacked out. He said that as a result of the blackout, he did not remember the incident but pled guilty to assault. He said that after going to jail for assaulting his wife, he learned for the first time that he had mental problems and spent some time at Moccasin Bend Mental Health. He said medication helped control his seizures and blackouts and helped him remain calm. On cross-examination, the defendant testified that he had not wanted to hurt the victim and had only wanted the money that the victim owed him. He said he knew other people were in the apartment building when he took the gun to the victim's apartment.

Ricarter Thomas, the defendant's stepfather, testified that after the defendant's car wreck in Chattanooga, the defendant was in another car wreck in Atlanta. The defendant spent all of the settlement money the defendant received from the Chattanooga wreck and tried to borrow money

from Mr. Thomas and the defendant's mother. Mr. Thomas told the defendant to collect the money that the defendant had loaned to friends. Mr. Thomas testified that he owned businesses in Atlanta, that the defendant could work for him, and that the defendant could make about \$600 per week. He said that the defendant could live with him and his wife and that they would look out for the defendant.

According to the defendant's presentence report, the then twenty-seven-year-old defendant was married but separated from his wife, had two children, and dropped out of high school after the ninth grade. In the report, he stated that he began using marijuana when he was twelve years old and cocaine when he was seventeen, that he smoked marijuana daily, and that he used about one-half gram of cocaine every two days. The defendant also stated that he had been diagnosed with bipolar disorder, polysubstance dependence, intermittent explosive disorder, asthma, seizure disorder due to head trauma, tobacco abuse, and peptic ulcer disease. The report shows that as a result of a 1999 car wreck, screws and plates were inserted in the defendant's right hip and he suffered a head laceration and slight spine fracture. He described his physical health as fair and his mental health as poor, feeling scared and depressed. The presentence investigator confirmed that the defendant took several medications for his mental condition. The presentence report shows that the defendant worked for Golden Gallon from January to March 2003 and Greenwood Cemetery from May to July 2003. Although the defendant also claimed to have worked as a cook for Buffalo Wild Wings from January to April 2002, the investigator was unable to confirm that employment. The report also shows that the defendant was convicted of assault in August 2003. In the report, he stated that he was sorry for shooting the victim.

The trial court determined that enhancement factor (7), that the "personal injuries inflicted upon . . . the victim [were] particularly great," applied to his sentence. See T.C.A. § 40-35-114(7). The trial court also applied factor (11), that the defendant "had no hesitation about committing a crime when the risk to human life was high," on the basis that other people were near the apartment building at the time of the shooting. See T.C.A. § 40-35-114(11). The trial court determined that the defendant's problems resulting from the car wreck and his mental illness warranted mitigating his sentence. See T.C.A. § 40-35-113(13). The trial court enhanced the sentence from eight years to ten years and then reduced the sentence to nine years. Although the trial court considered the defendant's family support helpful, it refused to mitigate the defendant's sentence any further. Due to the fact that the sentence was nine years, the trial court noted that it could not grant alternative sentencing. See T.C.A. § 40-35-303(a).

The defendant appeals, claiming that his sentence is excessive. Specifically, he argues that the trial court improperly applied the enhancement factors. In addition, he argues that the trial court failed to consider his work history, remorse, mental health problems, background, potential for rehabilitation, offer to make restitution, and lack of a prior criminal history as mitigating factors. Finally, he argues that alternative sentencing is appropriate in this case. The state agrees that the trial court improperly applied enhancement factor (7) but contends that the trial court properly applied and enhanced the defendant's sentence based upon factor (11) and properly refused to grant alternative sentencing. We conclude that the trial court improperly enhanced the defendant's

sentence and that his sentence should be eight years. We also conclude that alternative sentencing is not appropriate in this case.

When a defendant appeals the length, range, or manner of service of a sentence imposed by the trial court, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d), Sentencing Commission Comments. However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the sentence is purely de novo. Ashby, 823 S.W.2d at 169.

The defendant was sentenced as a Range I offender for which the applicable range for a Class B felony is eight to twelve years. See T.C.A. § 40-35-112(a)(2). The presumptive sentence for a Class B felony is the minimum in the range when no enhancement or mitigating factors are present. T.C.A. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Ashby, 823 S.W.2d at 169.

Initially, we note that this court has held that enhancement factor (7), that the defendant inflicted particularly great injuries on the victim, is inherent in the crime of attempted especially aggravated robbery. See Michael Lebron Taylor, No. 03C01-9810-CR-00366, Hamilton County (Tenn. Crim. App. Sept. 8, 1999) (citing State v. Holly Lack Earls, No. 01C01-9612-CC-00506, Coffee County (Tenn. Crim. App. Jan. 16, 1998)), app. denied (Tenn. Mar. 6, 2000). We conclude that the trial court improperly applied this factor.

Factor (11), that the defendant had no hesitation about committing a crime when the risk to human life was high, may apply if a person other than the victim was in the area of high risk. See State v. Jones, 883 S.W.2d 597, 603 (Tenn. 1995). The victim testified that his girlfriend and a friend were in the apartment during the shooting. However, there is no proof that they were standing near the defendant or the victim during the crime or that the defendant's conduct endangered the life of anyone other than the victim. Thus, we conclude that factor (11) was inapplicable. Because the trial court improperly applied these two enhancement factors, our review of the defendant's sentence is de novo with no presumption of correctness.

When determining if incarceration is appropriate, a trial court should consider that (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit

similar offenses, or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing T.C.A. § 40-35-103(1)(A)-(C)). Additionally, a trial court should consider a defendant's potential or lack of potential for rehabilitation. T.C.A. § 40-35-103(5). In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168.

A defendant is eligible for probation for a sentence of eight years or less. See T.C.A. § 40-35-303(a). However, the defendant was convicted of a Class B felony and, therefore, was not entitled to the presumption that he was a favorable candidate for alternative sentencing. See T.C.A. § 40-35-102(6). Based upon our de novo review, we conclude that alternative sentencing is not appropriate in the present case. First, confinement is necessary to emphasize to this defendant the seriousness of his actions. The defendant went to the victim's apartment to collect a debt. According to the presentence report, the victim owed the defendant three hundred dollars. When the victim told the defendant he did not have the money, the defendant left, returned with a pistol, and shot into a wall. He and the victim then struggled over the gun, and the victim was shot in the neck. The victim sustained life-threatening injuries, continues to experience physical problems due to the shooting, and still has the bullet in his body. Also, the defendant has been a long-time drug addict, has failed to seek any treatment for his addictions, and has little potential for rehabilitation. We conclude that the defendant should serve his sentence in confinement.

Based upon the foregoing and the record as a whole, we conclude that the trial court improperly enhanced the defendant's sentence and that the defendant's sentence should be eight years. We also conclude that he should serve his sentence in the Department of Correction.

JOSEPH M. TIPTON, JUDGE